

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning High-Speed Access to the)	GN Docket No. 00-185
Internet Over Cable and Other)	
Facilities)	
)	
Internet Over Cable Declaratory Ruling)	
)	
Appropriate Regulatory Treatment for Broadband)	CS Docket No. 02-52
Access to Internet Over Cable Facilities)	
)	

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COMMENTS OF COMCAST CORPORATION

Comcast Corporation (“Comcast”) hereby responds to the Commission’s request for additional comments pertaining to issues left unresolved by the Declaratory Ruling previously issued in this proceeding.^{1/}

I. INTRODUCTION AND SUMMARY

By any measure, the development of cable Internet services is an astounding success. Just a few short years ago, as American consumers began to explore the World Wide Web, Internet access was confined to speeds of merely tens of kilobits per second or less, and the only available supplier of Internet access to virtually every home was the local telephone company. Then, a handful of leaders from the cable industry, Silicon

^{1/} *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (Mar. 15, 2002) (cited herein, as appropriate, as “*Declaratory Ruling*” or “*Notice*”).

Valley, and Wall Street took an enormous risk. They placed a large bet on an unproven technology, believing it could fulfill a still-gestational need.

Now, well short of a decade into this venture, the results are breathtaking. High-speed cable Internet services now enable residential consumers to experience the Internet at speeds that are 25-50 times faster than those available as recently as 1996. Tens of billions of dollars have been invested in cable plant upgrades and rebuilds, and high-speed cable Internet service is now available to tens of millions of residences, nationwide. Over seven million customers are already using cable Internet service (and of course can access any Internet content of their choosing), and their ranks are growing rapidly.

Cable's leadership has impelled telephone companies to unleash their own high-speed transmission technology (DSL), which they had withheld from the market for many years. And the consumer demand that has now been demonstrated is also stimulating investment in rival technologies and services from satellite and terrestrial wireless providers and even developers of unlicensed (Part 15) spectrum technologies. As a result of all these developments, "broadband" has now taken on a prominence in communications policymaking that rivals that of the twin pillars of the Telecommunications Act of 1996 ("1996 Act"): competition and deregulation.

Many people and many organizations deserve credit for these salutary developments. The engineers who developed cable modems. The financiers who supplied private risk capital. The cable companies that made this a priority, took on the debt, and built the needed facilities, even when the industry was still healing from the devastating effects of rate regulation (which had curtailed investment, forestalled network

improvements, and prevented the introduction of new programming and new services). And many others.

The Commission, too, helped achieve this success. Confronted with demands to impose legacy regulations on this bold new service, the Commission steadfastly resisted. Time and again, the Commission was importuned to saddle cable Internet with rules designed for monopoly telephone companies. Time and again, the Commission refused.

It is against this backdrop that the Commission now seeks comment on whether it can and should impose a multiple ISP requirement on providers of high-speed cable Internet services. The answer is an emphatic “no.”

The Commission has already made key determinations needed to answer this question. The *Declaratory Ruling* issued earlier this year resolves the “classification issue.” Comcast supports the Commission’s determination that cable Internet service is an integrated, interstate, information service that does not include any telecommunications service component. That settled, no multiple ISP requirement can be imposed except under the Commission’s Title I “ancillary authority.” This authority, however, does not permit imposition of common carrier-style regulation on interstate information services. A multiple ISP requirement is *not* needed to advance any statutory requirement and would in fact *contravene* explicit legislative guidance.

Even if the Commission had statutory authority to extend its regulatory reach in this manner, there are compelling policy reasons not to do so. Two decades of experience with protecting information services against regulation – and the resulting immense growth of this market – bear testament to the wisdom of this policy. So, too, do nearly five years of watchful restraint regarding cable Internet service, with similarly

astounding growth. As the Commission has repeatedly recognized, regulatory intervention in this area would create market uncertainty, chill the climate for investment, and undermine the rapid and timely deployment of advanced services to all Americans.

Against the enormous costs of regulation, the putative benefits are trivial, or more likely nonexistent. Cable operators are already moving forward with multiple ISP arrangements. Despite significant technical, operational, and business complexities, Comcast has now moved beyond technical and market trials with third-party ISPs and has begun commercial operations. Cable operators have strong marketplace incentives to find ways to stimulate additional consumer demand for high-speed Internet service, and partnering with third-party ISPs is one way to do so. Meanwhile, even in a single-ISP environment, consumers can access whatever Internet content they wish, without constraint. Those who find value in the services offered by AOL, MSN, or Earthlink can use them; indeed, consumers need never see even the “first screen” of their cable ISP if they prefer not to. Click-through access ensures that cable Internet customers can experience the full abundance and diversity of the entire Web.

While federal regulation of cable Internet service would be both unlawful and unwise, state and local regulation would be more so. Interstate information services have long been fenced off from intrusion by the states and their instrumentalities, and two decades of experience prove that this policy must endure. There is no basis on which only one class of information service provider can reasonably be required to obtain a local franchise as a condition of offering service (over a facility that is already approved to use public rights-of-way). Franchise fees – which by definition includes any tax imposed uniquely on cable operators – may be imposed only on cable services, not

information services. Customer service and consumer privacy interests are safeguarded by the imperatives of a competitive market. No additional benefit, and some significant loss, would result from adoption of a patchwork quilt of disparate state and local rules regarding customer service, privacy, or any other element of cable Internet service.

If ever there was a service that showed how competition and deregulation are supposed to work, that service is cable Internet service.

II. THE COMMISSION CANNOT AND SHOULD NOT IMPOSE A “MULTIPLE ISP” REQUIREMENT ON CABLE OPERATORS.

A. The Commission Has Consciously and Correctly Refrained from Regulating Cable Internet Services.

The Commission’s policy toward cable Internet service has been one of watchful restraint. Ever since 1998, when the issue first arose in the Commission’s *First Section 706 Report* and again in the AT&T/TCI Merger, the Commission has resisted claims that it should intervene in the marketplace to compel cable operators to offer multiple ISPs over their cable systems.^{2/} Instead, the Commission consciously chose a policy of waiting and watching to see how the nascent market for broadband Internet services developed.

^{2/} See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Report*, 14 FCC Rcd 2398, 2423, 2499 ¶¶ 48, 101 (1999) (“*First 706 Report*”) (“We believe it is premature to conclude that there will not be competition in the consumer market for broadband. The preconditions for monopoly appear absent [T]he record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers. [W]e see no reason to take action on this issue at this time”); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor, To AT&T Corp., Transferee*, CS Docket No. 98-178, *Memorandum Opinion and Order*, 14 FCC Rcd 3160, 3205-07 ¶¶ 93-96 (1999).

In adopting this approach, the Commission properly determined that regulatory intervention in cable's efforts would result in market uncertainty and a decrease in investment.^{3/} The Commission also wisely determined that regulatory action would be inconsistent with its mandate to ensure that advanced services were deployed in a reasonable and timely fashion.^{4/}

Since that time, the Commission has perceived no need for regulatory intervention with respect to cable Internet services.^{5/} As discussed below, this deregulatory, or "hands-off," approach has led to the widespread deployment of high-speed cable Internet services and a proliferation of other technologies capable of supporting high-speed Internet services. Cable Internet services alone are now available to 66% of residential homes.^{6/} When that is combined with DSL-based Internet services, wireless, and

^{3/} *First 706 Report*, 14 FCC Rcd at 2449 ¶ 101 (noting that regulatory intervention could affect increases in bandwidth technologies); *see also* Jason Oxman, *The FCC and the Unregulation of the Internet*, FCC, OPP Working Paper No. 31, at 21 (1999), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

^{4/} *First 706 Report*, 14 FCC Rcd at 2449 ¶ 101; *see also* Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission, On Industry Monitoring Sessions Convened By Cable Services Bureau*, at 45 (1999), available at <http://www.fcc.gov/Bureaus/Cable Reports/broadbandtoday.pdf> ("Cable Bureau Report").

^{5/} *See also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, CS Docket No. 99-251, *Memorandum Opinion and Order*, 15 FCC Rcd 9816, 9871 ¶ 123 (2000) (concluding that a forced access requirement was unnecessary and noting that it would continue to monitor industry developments); *Inquiry Concerning the Deployment of Adv. Telecomm. Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, *Second Report*, 15 FCC Rcd 20913, 20917-19 ¶ 8 (2000) (declining to impose a forced access requirement); *Cable Bureau Report*, at 15 ("the Commission has adopted a policy of vigilant restraint, refraining from mandating open access "at this time").

^{6/} *See Cable Modem Stats & Projections* (Mar. 31, 2002), available at <http://www.cabledatacomnews.com/cmhc/cmhc16.html> ("Cable Modem Stats").

satellite-based Internet services, high-speed Internet service is now available almost ubiquitously – and in most cases competitively – throughout the country.

B. The Commission Has Less Reason than Ever To Establish a Multiple ISP Requirement.

Thanks in part to the Commission's restraint, cable Internet service is growing robustly. Deployment, as just noted, is widespread, and continues to increase.^{7/} Both the National Telecommunications and Information Administration ("NTIA") and the Commission have recently confirmed that broadband deployment is proceeding at a rapid pace under the current regulatory structure. This past February, the Commission released its *Third 706 Report*, which reported that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely manner.^{8/} Further, the availability of advanced services appears to extend to diverse groupings of consumers, including consumers that have been previously identified as particularly "vulnerable to not receiving timely access to advanced services," such as "low-income customers," those living in sparsely populated areas, minority consumers, "and persons with disabilities."^{9/} Similarly, a recent report from NTIA concludes that broadband

^{7/} Compare *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Third Report*, 17 FCC Rcd 2844, 2859 ¶ 30 & n.69 (2002) ("*Third 706 Report*") ("penetration of advanced services quadrupled from 1.0 percent of households at the end of 1999 to 3.8 percent at the end of June 2001" with "approximately 5.0 million" residential customers subscribing to cable Internet services) with Robert Sachs, *Industry Perspective: Connecting America to the Future, and a More Promising Present*, CableFAX, May 6, 2002 ("*Industry Perspective*") (8.0 million cable Internet customers by the end of the first quarter 2002).

^{8/} *Third 706 Report*, 17 FCC Rcd at 2847 ¶ 7.

^{9/} *Third 706 Report*, 17 FCC Rcd at 2884 ¶ 101.

deployment compares favorably to the deployment rates of other communications technologies and services. Indeed, it “outstrips other technologies such as color television, cell phones, pagers, and VCRs.”^{10/} All available evidence demonstrates that the deployment of broadband networks has been remarkable.^{11/}

According to Commission numbers that do not reflect the past several months of industry growth, high-speed cable Internet service offerings were available to 77.5 million homes^{12/} and DSL services were available to 51.5 million homes, as of YE01.^{13/} Now that DBS also offers high-speed services,^{14/} these services are essentially ubiquitous and, in most cases, competitive. Thus, the supply of high-speed Internet is – by any measure – abundant.

Demand, too, is robust; consumers continue to show intense enthusiasm for high-speed services. Both NTIA and the FCC have indicated that broadband subscribership

^{10/} U.S. Department of Commerce, National Telecommunications and Information Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet*, at 37 (Feb. 2002) available at <http://www.ntia.doc.gov/ntiahome/dn> (“NTIA Report”); see also Communications Daily, June 4, 2002, at 6 (reporting that broadband adoption rates are strong, especially when compared with the adoption rates of various consumer electronic products).

^{11/} See, e.g., Nancy Victory, *Removing Roadblocks to Broadband Deployment*, Remarks before the Competition Policy Institute’s Conference *Keeping Telecom Policy on Track*, at 2 (Dec. 6, 2001), available at http://www.ntia.doc.gov/opadhome/opad_brbn.htm (noting that most participants in NTIA’s Broadband Forum “agreed that broadband has been rolling out at a relatively fast pace nationally”); Nancy Victory, Remarks to the Federal Communications Bar Association (Apr. 12, 2002) (commenting that the supply of broadband services continues to rise).

^{12/} *Third 706 Report*, 17 FCC Rcd at 2871 ¶ 65; see also *Cable Modem Stats* (reporting that cable Internet service is available to 66% of homes).

^{13/} *Third 706 Report*, 17 FCC Rcd at 2866, 2873 ¶¶ 50, 70.

^{14/} See DirectTV’s DirectWay Internet Website at <http://directv.direcway.com>.

continues to rise rapidly.^{15/} For example, cable Internet services had a reported 8.0 million subscribers at the end of the first quarter this year^{16/} and DSL subscribership reached “4.4 million at the end of the fourth quarter last year.”^{17/}

Strong subscriber demand for broadband service has spurred substantial investment. Cable operators have made significant investment in network upgrades that enable the provision of cable Internet services (as well as other services).^{18/} In 2000, the cable industry spent over \$15.5 billion on the construction of new plant, upgrades, rebuilds, new equipment, and the maintenance of new and existing equipment.^{19/} Comcast alone has invested over \$5 billion dollars in upgrades and rebuilds.^{20/} In addition to the investments made by cable operators, many other providers, using a variety of distribution technologies, are investing billions of dollars to deploy backbone

^{15/} NTIA Report at 36 (reporting that broadband subscribership had more than doubled in a single year, rising from 5 percent to 10.8 percent of the population; also, use by Internet users rose from 11 percent to 20 percent); *see also Third 706 Report*, 17 FCC Rcd at 2847 ¶ 7; Staff Multichannel News, *Briefs*, Multichannel News, May 27, 2002 (reporting that the broadband penetration rate was up 48% in the four largest markets since last year).

^{16/} *See Industry Perspective*.

^{17/} *See Telecom, Communications Daily*, Feb. 13, 2002.

^{18/} *See Industry Perspective* (indicating that the cable industry has invested “\$60 billion” in broadband, which is “approximately \$1,000 per subscriber in upgraded systems”).

^{19/} *Third 706 Report*, 17 FCC Rcd at 2871 ¶ 65.

^{20/} *Applications for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, Applications and Public Interest Statement: Description of Transactions, Public Interest Showing, and Related Demonstrations at 10 (Feb. 28, 2002) (“*Merger Application*”).

and last-mile broadband networks.^{21/} The ILECs invested \$29.4 billion in infrastructure in 2000, with a substantial portion allocated to DSL technologies.^{22/} Satellite is also expected to invest over \$28 billion dollars in high-speed projects over the next ten years.^{23/} In short, multiple providers using multiple technologies are aggressively making high-speed Internet services available to consumers throughout the nation.

Cable Internet customers have access to the fullest array of content available on the Internet. High-speed cable Internet users demand full access to the Internet and this is what the competitive marketplace delivers. Customers will always be able to reach the content they seek to access, regardless of the technologies used to provide this content, or the platforms used to deliver this service. Cable operators would not be able to compete with other facilities-based broadband providers if they restricted access to content. There is no evidence that cable operators have impaired click-through access or will ever do so.

Comcast's own market experience further supports the notion that the marketplace is functioning properly. Comcast Corporation is currently the third largest cable operator in the United States, with more than 8.5 million cable subscribers.^{24/} The company's aggressive investments in system upgrades have enabled the company to provide digital services, high-speed Internet, and video-on-demand throughout a large (and still-growing) number of the markets that the company serves, and to initiate a

^{21/} *Third 706 Report*, 17 FCC Rcd at 2870 ¶ 61 (noting that providers of other services, including fixed wireless, satellite, and DSL, have invested in the deployment of these technologies and most of these systems are available in all fifty states).

^{22/} *Third 706 Report*, 17 FCC Rcd at 2872 ¶ 69.

^{23/} *Third 706 Report*, 17 FCC Rcd at 2877 ¶ 78 & n.196.

rollout of high-definition television. Comcast currently provides broadband services through its own ISP, Comcast High-Speed Internet, to over 1 million customers nationwide.^{25/}

Just weeks after its contractual exclusivity commitment to Excite at Home ended, Comcast announced its first multiple ISP agreement. Previously, Comcast had conducted various technical trials of multiple ISP service.^{26/} Comcast recently undertook to permit United Online to offer its Net Zero and Juno high-speed Internet Service over Comcast's network in Nashville and Indianapolis.^{27/} Commercial operations under that agreement began on May 30,^{28/} and the parties hope their experience in these markets will establish a foundation that will permit expansion to additional cities as well. Comcast is engaged in active negotiations with other ISPs and hopes to make additional announcements in coming months.^{29/}

^{24/} See Press Release, *Comcast Reports Strong First Quarter Results*, Comcast Investor Relations Financial News, May 1, 2002, at 2 available at <http://www.cmcsk.com>.

^{25/} *Id.* On a pro forma basis (adjusted for transactions), Comcast's high-speed Internet subscribership increased 81% over the preceding 12 months.

^{26/} The *Declaratory Ruling* says that Comcast announced a trial and that the trial did not occur. *Declaratory Ruling* ¶ 26 n.119. The Commission provides no basis for this statement and it is, in fact, incorrect.

^{27/} Press Release, *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service*, Comcast Investor Relations Financial News, Feb. 26, 2002, available at <http://www.cmcsk.com>.

^{28/} Press Release, *United Online Launches Inaugural High-Speed Internet Service*, United Online, Inc., May 30, 2002, available at <http://biz.yahoo.com/pz/020530/27966.html>.

^{29/} In connection with its planned merger with AT&T Broadband, Comcast has agreed that, if AT&T Comcast offers a high-speed Internet service agreement to any third party on any of its cable systems, then it will offer an Internet service agreement on non-

In conjunction with its merger with AT&T Broadband, Comcast has also committed to honor the multiple ISP agreements that AT&T Broadband has entered into.^{30/} Earlier this year, AT&T Broadband and Earthlink reached an agreement that allows Earthlink to offer-high-speed cable Internet service via AT&T Broadband's network.^{31/} Earthlink will initially launch this service in the greater Boston and Seattle markets, with additional cities to follow in 2003. AT&T also has an agreement with NET1Plus in Massachusetts that allows NET1Plus to offer its Internet service via the AT&T Broadband network.^{32/} AT&T has forged a similar agreement with Internet Central in Seattle to allow the ISP to provide high-technology services over AT&T's network.^{33/}

Other cable operators are moving down a similar path.^{34/} Last November, Cox Communications entered into a multiple ISP technical trial with EarthLink and America

discriminatory terms with respect to the same cable systems to Microsoft's Internet service provider, The Microsoft Network. *Merger Application* at 8 n.9

^{30/} Letter from Brian Roberts, President, Comcast Corporation, to Hon. Edward Markey, Congressman, U.S. House of Representatives, at 1 (Apr. 11, 2002) (on file with author).

^{31/} Press Release, *AT&T Broadband and Earthlink Forge ISP Choice Agreement*, Earthlink Press Room, Mar. 12, 2002, available at <http://www.earthlink.net/about>.

^{32/} Press Release, *AT&T Broadband and NET1Plus Reach ISP Choice Agreement*, AT&T Press Room, Apr. 23, 2002, available at <http://www.att.com/news/>.

^{33/} Press Release, *AT&T Broadband and Seattle-Based ISP Internet Central Forge Choice Agreement*, AT&T News Room, May 2, 2002, available at <http://www.att.com/news/>.

^{34/} Due to government requirements imposed as a result of its unique circumstances, AOL Time Warner has the greatest experience with multiple ISP offerings. Time Warner Cable has agreements with (among others), Juno, and Earthlink. The Federal Trade Commission recently approved five ISPs and four regional ISPs to use AOLTW's cable system including Big Net Holdings, Global Systems, Inc, South Texas Internet Connections, Digital Communications Networks, Internet Junction Corp, West Central

Online.^{35/} Both ISPs will offer Internet services over Cox's cable network in El Dorado, Arkansas.^{36/} Susquehanna Communications ("SusCom") also has plans to launch multiple ISPs in four of its Midwest markets by year-end.^{37/}

In short, the marketplace is growing; deployment is expanding; subscribership is increasing; competition is strong and intensifying; and consumers can obtain whatever content they want. Accordingly, there is no need for the government to impose a forced access condition on cable Internet service.

C. The Declaratory Ruling in this Proceeding Further Strengthens the Case Against Government Intervention.

The Commission's decision in the Declaratory Ruling further strengthens the case for maintaining the unregulated status of cable Internet services. First, the Commission correctly determined that cable Internet service is an integrated information service^{38/} and includes no "offering . . . of telecommunications services to subscribers or ISPs."^{39/} Second, the Commission also wisely refrained from extending the *Computer II* and *Frame Relay* regime to require that information services provided over cable facilities be

Ohio Internet Connections, Inc., and New York Connect.Net, Ltd. See Dick Kelsey, *Five ISPs Approved to Use AOLTW Cable Lines*, Newsbytes (washingtonpost.com), Feb. 27, 2002.

^{35/} News Release, Cox, AOL and EarthLink Launch High-Speed Service Trial, Cox Communications Press Room, Nov. 6, 2001, available at <http://www.cox.com/Corp.>; see also *Multiple Access: A Tale of Three MSOs*, CableFAX Daily, June 5, 2002, at 4 ("Multiple Access") (reporting that the technical trial in Arkansas answered many forced access questions and noting that the company is now addressing economic and customer service-related issues).

^{36/} *Id.*

^{37/} See *Multiple Access*, at 4.

^{38/} *Declaratory Ruling* ¶ 38.

^{39/} *Declaratory Ruling* ¶ 39.

unbundled so that the underlying transmission is offered as a stand-alone telecommunications service.^{40/} Third, the Commission applied an end-to-end analysis to determine that cable Internet service is an *interstate* service.^{41/} Collectively, and as discussed in a subsequent section, these decisions foreclose the imposition of a multiple ISP requirement on high-speed cable Internet service.

In addition to reaching the appropriate legal conclusions, the Commission also made crucial factual findings that support maintaining the unregulated status of cable Internet service. The Commission explicitly recognized that cable Internet service is technically complex, even in a single ISP environment.^{42/} The Commission further found that adapting to a multiple ISP environment “requires a re-thinking of many technical, operational, and financial issues, including implementation of routing techniques to accommodate multiple ISPs, Quality of Service, and the compensation, billing, and customer service arrangements between the cable operator and the ISPs.”^{43/} Recognizing that, even with a single ISP arrangement, cable Internet customers can access whatever content or service they desire, set whatever home page they wish, and use any portal they

^{40/} *Declaratory Ruling* ¶¶ 42-47 (noting that it would be “inconsistent” with the public interest). See generally *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 20828, *Final Decision*, 77 F.C.C.2d 384 (1980) (“*Computer II*”), on reconsideration, *Memorandum Opinion and Order*, 84 F.C.C.2d 50 (1980) and *Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer and Commun. Indus. Ass'n v FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Independent Data Commun. Mfrs. Ass'n, Inc. and AT&T Co. Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decision on the IDCMA Petition*, DA 95-2190, *Memorandum Opinion and Order*, 10 FCC Rcd 13717, 13722 ¶ 40 (1995) (“*Frame Relay*”).

^{41/} *Declaratory Ruling* ¶ 59.

^{42/} *Declaratory Ruling* ¶¶ 12-19; see also *id.* ¶ 32 (“technologies and business models used to provide cable modem service are also complex and are still evolving”).

believe provides them with value,^{44/} the Commission quite rightly determined that arrangements between cable operators and ISPs should continue to evolve through “negotiations and business decisions,” rather than governmental coercion.^{45/}

D. A Multiple ISP Requirement Cannot Be Justified in Law or Policy.

1. A Multiple ISP Requirement Cannot Be Justified Under Title I.

Now that the Commission has correctly determined that high-speed cable Internet service is not a Title II telecommunications service and does not include a telecommunications service component,^{46/} and now that it has found that cable Internet service is not a Title VI “cable service,”^{47/} any multiple ISP requirement would need to be justified under Title I. The *Notice* seeks to explore whether the Commission should exercise its Title I authority with regard to the provision of cable Internet service.^{48/} The Commission’s Title I authority, however, provides no basis for any such regulation.

First, any regulations imposed under the ancillary authority of Title I must be necessary to achieve the FCC’s statutory responsibilities. As the *Notice* properly recognizes, the Commission’s Title I authority “‘is not ‘unrestrained’ and may only be exercised provided such action is ‘necessary to ensure the achievement of the

^{43/} *Declaratory Ruling* ¶ 29 (footnotes omitted).

^{44/} *Declaratory Ruling* ¶¶ 11, 25.

^{45/} *Declaratory Ruling* ¶ 30.

^{46/} *Declaratory Ruling* ¶ 40.

^{47/} *Declaratory Ruling* ¶¶ 60, 67.

^{48/} *Notice* ¶ 77.

Commission's statutory responsibilities.”^{49/} Furthermore, as Section 4(i) makes clear, the Commission may only make “rules and regulations, and issue such orders, *not inconsistent* with [the Communications Act], as may be *necessary* in the execution of its functions.”^{50/} A “forced access” requirement cannot be justified as fulfilling any specific statutory requirement.^{51/} Moreover, to the extent Congress has provided guidance, it is to quite the opposite effect.

Pursuant to an uncodified provision of the Telecommunications Act, the Commission is required to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”^{52/} It is to do so generally through *deregulatory* means, by “removing barriers to infrastructure investment” and

^{49/} *Declaratory Ruling* ¶ 75, citing *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (“*Midwest Video*”).

^{50/} See 47 U.S.C. § 154(i) (emphasis added). The Commission's Title I powers are not “infinitely elastic.” *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292-93 (7th Cir. 1985). In fact, the D.C. Circuit has noted that Title I cannot be read as a “general grant of power to take any action necessary and proper to those ends.” *National Ass'n of Regulatory Utility Com'rs v. FCC*, 533 F.2d 601, 613 n.77 (D.C. Cir. 1976). Indeed, the Commission has understood that the requirement to regulate only in support of a statutory purpose “means not regulating at all, especially if a problem does not exist.” *Computer II*, 77 F.C.C.2d at 433, citing *Home Box Office v. FCC*, 567 F.2d 9 (1977) (subsequent history omitted).

^{51/} Any assertion of the Commission's ancillary jurisdiction must be in support of a specific statutory requirement and may not be inconsistent with other provisions of the Communications Act. *Midwest Video*, 440 U.S. at 708-709. Further, ancillary jurisdiction must be “reasonably ancillary to the effective performance of the Commission's various responsibilities.” *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); see also *People of State of the California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) (emphasis added) (confirming that “Title I is not an independent source of regulatory authority; rather it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities”).

^{52/} See *Telecommunications Act of 1996*, Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (1996) (“*Section 706*”).

engaging in “regulatory forbearance.”^{53/} Congress has also determined (and amended the Communications Act to proclaim) that it is “the policy of the United States to promote the continued development of the Internet and other interactive computer services and other interactive media” and “to preserve the vibrant and competitive free market that presently exists for the Internet and other computer services, *unfettered by Federal or State regulation.*”^{54/} The Commission itself has recognized that the best way to foster the goals of Section 706 is to allow the market to function with minimal regulation.^{55/} Plainly, these are not provisions that would be supported – and they would in fact be contravened – by adoption of regulatory requirements applicable to cable Internet services.

2. The Commission’s Exercise of its Title I Authority Would Raise Serious Constitutional Issues.

A further constraint on the Commission’s Title I powers is the well-established principle that statutes should be construed to avoid creating constitutional issues.^{56/} In considering the potential scope of its Title I authority, the Commission necessarily must

^{53/} See *Section 706*. That section also contemplates increased regulation in one respect – by calling for “measures that promote competition in the local telecommunications market” – but that is a reference to the particularized provisions of 47 U.S.C. § 251(c), which apply only to incumbent local exchange carriers, not to cable companies providing cable Internet services.

^{54/} See 47 U.S.C. §§ 230(b)(1)&(2)(emphasis added).

^{55/} See, e.g., *Third 706 Report*, 17 FCC Rcd at 2897 ¶ 133 (affirming its determination that “competition, not regulation, holds the key to stimulating further deployment” and noting that “a minimal regulatory framework will promote competition and thus encourage investment in advanced [services]”(citations omitted)).

^{56/} See, e.g., *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994), *superceded by statute*, 205 F.3d 416 (2000) (“Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions”(citations omitted)).

factor in the consideration that a multiple ISP requirement would implicate both the First and Fifth Amendments of the U.S. Constitution.

As to the First Amendment, it is settled law that cable operators “engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”^{57/} Imposing a requirement that cable operators provide non-discriminatory access to their cable Internet platform would limit a cable operator’s First Amendment discretion. The Supreme Court, in *Turner Broadcasting*, stated that Congress’ intent was to preserve the First Amendment editorial discretion of cable operators and that intrusions should be imposed only when absolutely necessary.^{58/} A federal district court applied this principle to municipal regulation of cable Internet and found it violative of the First Amendment.^{59/} In *Broward County*, the court found that a forced access requirement imposed by a county “singles out cable operators from all other speakers and discriminates further against those cable operators who choose to provide Internet content.”^{60/} The court also concluded that a multiple ISP requirement affects a cable operator’s ability to compete with effectively with other market

^{57/} *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”), citing *Leather v. Medlock*, 499 U.S. 439, 444 (1991).

^{58/} *Turner I*, 512 U.S. at 636, 664 (noting that a cable operator has “editorial discretion over which stations or programs to include in its repertoire” and to determine how the channels and the capacity of the system will be used to serve its customers; no regulation may be imposed except where government can “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate the[] harms in a direct and material way” (citations omitted)).

^{59/} See *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000) (“*Broward County*”).

^{60/} *Id.* at 692.

participants^{61/} and determined that such a requirement would not sustain review under an “intermediate” scrutiny” analysis.^{62/}

Contrary to the suggestion in the *Notice*,^{63/} the recent decision upholding satellite operators’ obligations to comply with the carriage requirements of the Satellite Home Viewers Improvement Act (“SHVIA”) does not shed any light on the constitutional analysis and does not provide support for imposing a multiple ISP requirement on cable operators.^{64/} That case is distinguishable in at least two critical respects. First, although Congress enacted SHVIA, including its “carry one, carry all” requirement, Congress did *not* enact a multiple ISP requirement for cable Internet operators. There is a huge difference between an agency carrying out the laws enacted by Congress and an agency writing requirements that Congress has chosen *not* to enact.^{65/} Second, the obligation

^{61/} *Id.* at 693 (a multiple ISP requirement “distorts and disrupts the integrity of the information market by interfering with the ability of market participants to use different cost structures and economic approaches based upon the inherent advantages and disadvantages of their respective technolog[ies]”).

^{62/} *Id.* at 697-698 (reasoning that the harm the ordinance purported to be addressed appeared to be non-existent).

^{63/} *Notice* ¶¶ 80-81.

^{64/} *Satellite Broadcasting and Comm’n Assoc. v. FCC*, 275 F.3d 337 (4th Cir. 2001), *aff’d* 146 F. Supp. 2d 803 (E.D. Va. 2001), *cert denied*, No. 01-1332 (June 17, 2002), Supreme Court 2001 Orders, *available at*, <http://www.supremecourtus.gov/orders/01ordersofthecourt.html>.

^{65/} Although Congress has been monitoring the multiple ISP debate for some time and legislation has been introduced on the issue, no legislation on this topic has been enacted. *See, e.g.*, Broadband Regulatory Parity Act, S. 2430, 107th Cong. (2002); Internet Tax Freedom Act of 2001, H.R. 1542, 107th Cong. (2001)(pending before the Senate); Internet Growth and Development Act of 1999, S. 977, 106th Cong. (1999); Consumer and Community Choice in Access Act of 1999, 106th Cong. (1999). Multiple ISP bills have been introduced in at least seventeen states, but were never enacted. *Open Access Legislation*, Comm. Daily, Mar. 23, 2000; *see also State Telecom Bill Flooding In and Out*, Comm. Daily, Feb. 11, 2002 (reporting that only one state now has forced access legislation pending). In addition, while hundreds of local franchise authorities

imposed on DBS providers was not a free-standing requirement but rather a conditional one. DBS operators are not required to carry any local broadcast signals *unless* they wish to avail themselves of the compulsory license that SHVIA grants them. There is a huge difference between placing a condition on a benefit that the DBS operators can choose to accept, or not, and imposing a regulatory requirement that is unaccompanied by any corresponding government-conferred benefit.

Imposing a multiple ISP requirement would also raise Fifth Amendment concerns because it would force cable operators to give up exclusive rights to their property^{66/} and turn it over to unaffiliated ISPs. Requiring cable operators to “unbundle” their networks in this fashion would constitute a regulatory taking for which cable operators must be compensated.^{67/} Further, the Commission would need to assess whether such a taking would constitute a legitimate public use; even must-carry – an *explicit* legislative

considered forced access proposals, fewer than a dozen adopted such proposals, and these decisions were generally overturned in the courts. *See, e.g., MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 714 (E.D. Va. 2000), *aff’d*, 257 F.3d 356, 363 (4th Cir. 2001) (affirming that forced access regulations violated Section 541(b)(3)(D) of the Cable Act); *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000) (holding that the City of Portland did not have the power to require open access for competing ISPs); *Broward County*, 124 F. Supp. 2d at 692 (holding that forced access ordinance was unconstitutional).

^{66/} The permanent physical occupation of a cable operator’s property results in a regulatory taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *see also Keystone Bituminous Coal Ass’n v. Duncan*, 771 F.2d 707, 712 (3d Cir. 1985), *aff’d*, 480 U.S. 470, 488 (1987).

^{67/} A multiple ISP requirement would compel cable operators to allow third parties to occupy and use their physical plants. Forcing cable operators to open their facilities eliminates their ability to exclude third parties. Cable operators must be compensated for the impairment of this valuable property right. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (interference with property can be characterized as a physical invasion by the government that necessitates just compensation).

enactment, based on detailed findings – was only upheld by a narrow 5 to 4 margin.^{68/}

Moreover, the Commission has no basis for computing the “right” price for the various services an ISP might want from a cable operator.

Both sets of constitutional issues would arrive only if the Commission sought to use Title I as a basis for regulation of cable Internet service. This, in turn, provides a strong basis for construing Title I *not* to authorize any such regulation (putting aside the many policy reasons not to regulate in this fashion).

3. As a Matter of Policy, the Commission Should Not Use its Title I Authority to Impose a Multiple ISP Requirement.

Even if the Commission felt that it lawfully could use its Title I authority to regulate information services, there are strong policy reasons why the Commission should not use exercise its Title I authority. The Commission has traditionally exercised great restraint in using Title I powers. In fact, as Chairman Powell has stated, “[Although] the FCC has jurisdiction to regulate virtually every Internet product, or service that facilitates communications under Title I of the Communications Act . . . , *the Commission, for decades now, has expressly declined to regulate similar computer, data processing and information services for the very reason that such interference would undermine the energy and drive toward innovation that characterizes these highly*

^{68/} *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997).

competitive markets.”^{69/} Moreover, as he observed on another occasion, “the fact that we have always had Title I authority has not meant it was prudent to exercise it.”^{70/}

To exercise that power now in the context of information services would represent a significant departure from the Commission’s historic use of its Title I powers.^{71/} Any such expansion of regulation would be decidedly contrary to the deregulatory direction that the Commission has followed for more than 20 years, and would directly conflict with the procompetitive and deregulatory objectives of the Telecommunications Act of 1996.^{72/}

Although the *Notice* asserts that the Commission has already exercised its Title I authority to regulate information services “in limited instances,”^{73/} in fact the Commission’s restraint has been even greater than the *Notice* acknowledges. Of the three instances cited,^{74/} *only one* actually entailed regulation of information services. One of the asserted instances of prior Title I regulation of information services is *Computer II*.^{75/}

^{69/} News Release, *Press Statement of Commissioner Michael Powell on the Approval of AOL-Time Warner Merger* (rel. Jan. 11, 2001) (emphasis added), available at <http://www.fcc.gov/speeches/POWELL/statements/2001/stmkp101.html>.

^{70/} *Applications for Consent to the Transfer of Control of Licenses by Time Warner Inc., and America Online, Inc. Transferors, to AOL Time Warner, Inc., Transferee*, CS Docket No. 00-30, Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, 16 FCC Rcd 6547, 6712 (2001).

^{71/} The *Computer II* decision included an explicit determination that interstate information services would not be regulated, either by the FCC or by the states. *Computer II*, 77 F.C.C.2d at 432-33 ¶¶ 125-127 (concluding that the FCC will not regulate information services and noting that the Commission, *not* the states, has the sole authority to impose regulations on such services).

^{72/} Pub. L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 56.

^{73/} *Notice* ¶ 76.

^{74/} *Notice* ¶ 76 n.295.

^{75/} *Computer II*, 77 F.C.C.2d 384.

That case, of course, was fundamentally about *deregulation*, not regulation, of information services; there, the Commission determined that information services (then known as “enhanced services”) were *not* to be regulated either by the FCC or the states.^{76/} Another of the cited examples involves the Commission’s decision to extend its rules to prohibit any restrictions that impair the ability of a fixed wireless subscriber to install or maintain its fixed wireless antenna on property owned or leased by the subscriber.^{77/} But that decision had nothing to do with regulating the provision of information services; indeed, the Commission’s ruling did not regulate any service, but rather removed limitations on antenna placement.^{78/}

The third example^{79/} is the only cited instance that actually involved Title I regulation of an information service provider, and even in this one instance the Commission stepped lightly and carefully. That one occasion involved extending disability access rules to a discrete subset of information services “integral to the use of

^{76/} In that case, the Commission also exercised its Title *II* authority to prohibit certain dominant carriers from providing basic transmission services in the same corporate entity that provided enhanced services. But the structural separation requirement entailed no direct regulation of the enhanced services, and was necessary only for the purpose of accomplishing the Commission’s primary goal of allowing enhanced services to remain *unregulated*.

^{77/} *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-21, *First Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22983, 23029 ¶ 102 (2000) (“*Competitive Networks*”).

^{78/} Also, the Commission’s rule served only to protect the rights of service purchasers to secure access to a service regulated directly under *Title III* absent the imposition of onerous or costly requirements on service providers. *Competitive Networks*, 15 FCC Rcd at 23027-23028 ¶¶ 97-100.

^{79/} *Implementation of Sections 255(c) and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons*

telecommunications services” in order to ensure the accessibility and usability of telecommunications services as intended by both Sections 255 and 251(a)(2).^{80/} There, the Commission stated that it would “use [its] discretion to reach *only those services [they] find essential to making telecommunications services accessible*” – voicemail and interactive menu services – and “decline[d] to extend accessibility obligations to any other information services.”^{81/} The Commission emphasized that its “assertion of ancillary jurisdiction is thus *discrete* and *limited*...[and as] a general matter, [the Commission will not alter its] past or current treatment of information services.”^{82/}

Thus, the record is clear that the Commission has a virtually unbroken record of restraint with regard to regulation of interstate information services. And the record is equally clear that the Commission’s deregulatory approach has proved to be a remarkable success. The need to stay the deregulatory course is especially compelling in the context of Internet services. By all accounts, the lack of regulation of information services has been a key underpinning of the creation and growth of the Internet, which is perhaps the greatest technological and economic innovation of the past decade. There is no basis for reversing the Commission’s long-standing deregulatory policy – and no basis whatever for using Title I powers to impose common carrier-like regulations on Internet services.

with Disabilities, WT Docket No. 96-198, *Report and Order and Further Notice of Inquiry*, 16 FCC Rcd 6417, 6457 ¶ 98 (1999) (“*Section 255 Access Order*”).

^{80/} *Id.*, 16 FCC Rcd at 6458 ¶ 99.

^{81/} *Id.*, 16 FCC Rcd at 6461 ¶ 107 (emphasis added).

^{82/} *Id.*, 16 FCC Rcd at 6461-6462 ¶ 108 (emphasis added).

4. The Commission Should Not Impose Title II-like Regulations on Information Services.

There are strong policy reasons why the Commission should not use Title I as a basis to reenact portions of Title II and extend them to information services. Common carrier-like regulations would inevitably embroil the Commission and the industry in innumerable and unnecessary complexities. First, there are extraordinary levels of detail to be worked out in arrangements between cable operators and independent ISPs. The Commission cannot assume that “one-size fits all” regulations would satisfy the needs of all ISPs; some ISPs want different things from cable operators than do others, and these needs can best be sorted out in commercial discussions, without government intervention. Second, if the Commission were to venture into this terrain, it would quickly become mired in issues of price, allocation of responsibilities, points and means of interconnection, and so on. The Commission should not shrink from addressing these issues where the statute requires it do so,^{83/} but the Commission’s experience with the complexity of that process ought to weigh heavily against assuming a similar responsibility in an area where the statute does *not* call for Commission involvement.

Likewise, the Commission should recognize that “regulatory parity” is not a basis for imposing common carrier obligations on information service providers including cable companies offering high-speed Internet services. The Commission’s job is to follow the law. Cable operators and telephone companies are subject to distinctly different statutory schemes.^{84/} Congress presumably believed that these differences were justified by the distinctly different characteristics of the two industries. Cable companies

^{83/} See, e.g., 47 U.S.C. § 251(c)(3).

and telephone companies employ different technologies; they follow different business models; they have vastly different economic characteristics; and they have been asked to serve the public in very different ways.^{84/} In addition, the telephone companies have a long record of resisting competition, including violations of the antitrust laws. Most fundamentally, telcos *chose* to be in the business of common carriage; to indiscriminately carry information for others has been the core of their business for more than a century. Cable is fundamentally a very different business because, with limited exceptions established by Congress, cable operators control the content on their own networks. For these reasons, applying common carrier requirements is perfectly logical in the case of phone companies, but vastly less so in the case of cable.

In any event, a large measure of parity already exists in the broadband arena. The ILECs already enjoy the benefits of deregulation for their Internet access services; the only remaining question is whether they should be permitted to withdraw their underlying, tariffed DSL telecommunications services from Title II. As the Commission

^{84/} Compare 47 U.S.C. § 201 *et seq.* with 47 U.S.C. § 521 *et seq.*

^{85/} Proponents of “regulatory parity” conveniently forget that cable operators are by no means free of regulatory obligations. In fact, cable operators are subject to numerous legal obligations that do not apply to telephone companies. Cable operators are required to comply with local franchise and franchise fee requirements. *See, e.g.*, 47 U.S.C. §§ 541, 542. In addition, they must carry the signals of local television broadcasters, and instead of being paid the total forward-looking long-run incremental cost of doing so (TELRIC), the statute sets a compensation rate of \$0.00. 47 U.S.C. § 534(b)(10) (“[a] cable operator shall not accept or request monetary payment or other valuable consideration in exchange for carriage of local commercial televisions stations”). Cable operators also have PEG access, leased access, and locally negotiated build-out services and anti-redlining requirements. *See* 47 U.S.C. §§ 531, 532, 534, 535.

has properly determined, that is a separate matter and should be resolved in a separate proceeding.^{86/}

Finally, the Commission must realize that invoking regulatory parity as a basis for imposing forced access on cable would sow the seeds of new disparities (with other Internet providers) and inevitably lead to still greater intrusion into currently unregulated businesses. If the Commission regulates cable but not its wireless and satellite competitors, one “disparity” will simply have been replaced with another. If the Commission decides to regulate *all* providers of Internet access facilities, it will inevitably impose pervasive regulation on markets that are currently characterized by vigorous, dynamic competition and robust investment and innovation. It is inconceivable that such an expansion of the Commission’s regulatory footprint would serve the public interest.

III. AS AN INTERSTATE INFORMATION SERVICE, CABLE INTERNET SERVICE MAY NOT BE SUBJECTED TO STATE AND LOCAL BURDENS

Although the Commission should refrain from imposing a multiple ISP requirement on cable operators, it should clarify that state and local efforts to impose additional requirements on providers of cable Internet service are preempted. The FCC has now settled that cable Internet service is an interstate information service.^{87/} The Commission long ago decided that interstate information services are within the

^{86/} The Commission is already considering issues related to the regulation of wireline broadband services in a separate proceeding, which properly excludes consideration of cable Internet services. See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Dockets Nos. 02-33, 95-20, 98-10, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3019, 3028 ¶ 16 (2002).

“exclusive jurisdiction” of the FCC and that state requirements are preempted.^{88/}

Because the localities are mere instrumentalities of the states, the localities have no more power than do the States to impose regulations on interstate information services, including cable Internet services.^{89/} Further, local regulation of “information services” would be inconsistent with long-standing FCC policy to preclude unnecessary regulation of such services.^{90/}

There is a separate and independent basis on which state and local regulation is impermissible. Congress has long reserved jurisdiction over interstate non-cable services

^{87/} *Declaratory Ruling* ¶ 59 (finding cable modem service to be an interstate information service).

^{88/} *Computer II*, 88 F.C.C.2d at 523-24, 541-42 (Commission exercised its exclusive jurisdiction over “interstate communication by wire or radio” to preempt any efforts by states to apply common carrier or utility regulations to firms that provide interstate information services), *aff’d*, *Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982) (affirming FCC authority to preempt state regulation of both interstate and jurisdictionally mixed enhanced services); *see also California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994) (accord).

^{89/} *See Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13, 96-14, 96-16, 96-19, *Memorandum Opinion and Order*, 13 FCC Rcd 3460, 3544 ¶ 179 (1997) (stating that the City of Abilene was not an “entity” separate and apart from the state of Texas and reasoning that Texas retains substantial sovereign power to decide what activities to authorize its political subdivisions to undertake).

^{90/} *See, e.g., Federal-State Joint Board on Universal Service Report to Congress*, CS Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501 ¶ 46 (“*Universal Service Report*”) (1998) (“An approach in which a broad range of information service providers are...presumptively subject to the broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry”); *Computer II*, 77 F.C.C.2d 384 ¶ 114 (“Insofar as enhanced services are concerned, there are two options – subject all enhanced services to regulation, or refrain from regulating them *in toto*. We believe that consistent with our overall statutory mandate, enhanced services should not be regulated under the Act”).

offered by cable operators to the federal government.^{91/} When Congress intends to permit additional or complementary local rules and requirements in cable operators, it so specifies.^{92/} But, in the case of information services, local regulation is explicitly barred.^{93/}

Likewise, in view of the Commission's ruling that cable Internet service is a Title I service, states and local franchise authorities must not be permitted to subject it to franchise fee requirements. The Commission has already tentatively concluded that Title VI provides no basis for an additional franchise fee on cable Internet service^{94/} Under the Communications Act, no other legal foundation exists. Any other "tax, fee, assessment" that singles out and applies specifically to a cable operator is by definition a franchise fee.^{95/} But local franchise authorities may only impose franchise fees on cable operator revenues "derived . . . from the operation of the cable system *to provide cable*

^{91/} See 47 U.S.C. § 541(d)(1) (authorizing States to require information tariffs for an "intrastate communications service provided by a cable system") (emphasis added); see also H. Rep. 98-934, 98th Cong., 2d Sess. 63 (1984) ("states would not have the authority to require cable operators to file informational tariffs for services (such as enhanced services and interconnection with interstate carriers) which are interstate in character"); 47 U.S.C. § 544(b)(1) (franchising authority may not "establish requirements for . . . information services").

^{92/} See, e.g., 47 U.S.C. §§ 551(g), 552(d)(2), 556(c).

^{93/} Title VI precludes state and local franchise authorities from imposing franchise requirements on cable companies' provision of information services. Section 624(a) prevents LFAs from regulating except as authorized by Title VI, and Section 624(b)(1) expressly precludes their regulation of information services. 47 U.S.C. § 544.

^{94/} Notice ¶ 105.

^{95/} See 47 U.S.C. § 542(g)(1).

services.”^{96/} And the Commission has already determined that cable Internet service is not a “cable service.” This leaves no basis for any cable-specific taxation.

There is yet another reason why the states and their subdivisions may not impose fees on cable Internet service. The Internet Tax Freedom Act specifies that “[n]o State or political subdivision thereof shall impose . . . taxes on Internet access” or “discriminatory taxes on electronic commerce.”^{97/} Any tax on cable Internet service would violate the first of these two admonitions; any tax on cable Internet service that does not apply to other ISPs (e.g., Earthlink) would violate the second as well. Local franchise authorities contend that they need the money for schools, trash pick-up, and for disaster relief from the effects of September 11th.^{98/} While these are legitimate governmental functions, and are cited in defense of all forms of state and local taxing authority,^{99/} they should be paid

^{96/} 47 U.S.C. § 542(b) (emphasis added) (limiting the amount of franchise fees to five percent of the cable operator’s gross revenues derived from providing cable services).

^{97/} Internet Tax Freedom Act, § 1101(a), *reproduced at note to* 47 U.S.C. § 151. While the Internet Tax Freedom Act does exempt cable franchise fees, it does not preempt fees of general applicability, but instead prohibits them altogether.

^{98/} See *Local Governments Challenge FCC Ruling on Cable Modems*, TR Daily, May 14, 2002 (reporting that the loss in revenue generated from fees imposed on cable Internet services “is hitting local governments at a time when they are being asked to dramatically increase spending on homeland security and public health programs in the wake of September 11th”); see also Larry Carson, *Counties Face Loss of Millions in Revenue; Cable Giant to Halt Modem Franchise Fee*, Baltimore Sun, Apr. 5, 2002, at A1 (noting that the revenues derived from the fees imposed on cable Internet service was “used to pay for schools, trash collection and other services”).

^{99/} See Press Release, *Local Government Groups Take FCC to Court Over Cable Modem Ruling*, National Association of Cities, May 14, 2002, at 1-2; see also Shane Walter, *Groups File Suit Against FCC’s Cable Modem Ruling*, National League of Cities May 20, 2002, available at <http://www.nlc.org> (stating that revenues generated from cable Internet service provides the support needed for basic city services).

for through taxes of general application, not by inflating the prices charged to broadband service subscribers.^{100/}

Local franchise authorities also may not require cable operators to obtain a separate franchise to provide cable Internet service. As the Commission has tentatively concluded, “once a cable operator has obtained a franchise for such a system, [its] information service classification should not affect the right of cable operators to access the rights of way as necessary to provide cable [Internet] service or to use their previously franchised systems to provide cable modem service.”^{101/} Cable operators are already required to obtain a franchise from a local franchising authority before it places its facilities in the public rights-of-way.^{102/} In providing cable Internet service, cable operators make no additional use of the rights-of-way and do not impose additional burdens on the rights-of-way. Imposing franchise requirements beyond the local franchise authorities’ limited rights-of-way management authority will only discourage deployment and investment in cable Internet services. Thus, the Commission should clarify that the types of activities that fall within the appropriate sphere of rights-of-way

^{100/} Before the FCC issued its Declaratory Ruling, some local franchise authorities were imposing franchise fees on cable Internet services. Inevitably, these fees were then flowed through to the consumer. As a result of the Declaratory Ruling, cable operators stopped collecting these fees on cable Internet subscribers, which directly led to lower prices for consumers. Paul Davidson, *Net Cable Service to Get a Bit Cheaper*, USA Today, Mar. 15, 2002 (noting that customers “[m]onthly savings would range from \$1.50 for a customer paying \$30, to \$3 for the high-end cable-modem household with a \$60 tab”).

^{101/} Notice ¶ 102.

^{102/} 47 U.S.C. § 541.

management are extremely limited^{103/} and do *not* include imposing new franchise requirements.

Local franchise authorities should not be permitted to set customer service standards for cable Internet service. As LFAs representatives contended while the regulatory classification of cable Internet service was still at issue,^{104/} classification of this service as an information service rather than a cable service necessarily curtails the ability of municipalities to regulate it.^{105/}

If the Commission finds that customer service regulation has not already been foreclosed by *Computer II*'s preemption of state regulation of information services and by finding that the service is not a cable service, Comcast respectfully urges the Commission to take such additional preemptive steps as are needed to prevent any such regulation. Regulation of customer service standards is not necessary in a competitive market. In a competitive marketplace, market forces ensure that companies maintain a proper level of customer service. Customers can always choose a provider that gives them a better value proposition. This is especially true with regard to cable Internet

^{103/} Those activities include "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them." *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e) and 253, CSR-4790, Memorandum Opinion and Order*, 12 FCC Rcd 21396, 21441 (1997), *recon. denied*, 13 FCC Rcd 16400 (1998).

^{104/} Notice ¶ 108.

^{105/} National League of Cities, *et al.* Comments at 13 (stating that cable Internet service is subject to customer service requirements only as "a cable service"); NATOA Comments at 20-21 (commenting that local franchise authorities will sustain their authority under Title VI to impose customer service regulations *only if* the Commission treats cable Internet service as a cable service).

service, which is a premium service and must be provided in a way that gives narrowband subscribers a compelling reason to switch.

The Commission should therefore preempt requirements imposed by local franchising authorities that work to discourage the marketplace development of cable Internet services and contravene the goals embodied in Sections 230(b) and 622(b)(1) of the Communications Act and Section 706 of the 1996 Act. Accordingly, the Commission must take this opportunity to preempt local franchise authorities from establishing customer service requirements. Some local franchise authorities are already imposing regulations on cable Internet providers, and others are considering doing so.^{106/} The result would be a patchwork quilt of inconsistent requirements that vary from town to town – and that impose burdens on interstate cable Internet service that are not shared by other Internet service providers. This new layer of regulation ought to be brought to a halt at the earliest possible opportunity.

Finally, the privacy rules embodied in section 631 should not be imposed on cable Internet service providers. Cable Internet service providers should be subject to the same privacy requirements as all other ISPs, regardless of how those ISPs deliver their service to customers. Consumers do not expect any more or any less respect for their privacy interests as a result of whether they obtain their Internet service from a cable company like Comcast, a telephone company like Verizon, or a nonfacilities-based ISP like Earthlink. To the extent rules are needed in this area, there should be a single national

^{106/} For example, until recently Montgomery County local officials applied the county's customer-service standards to cable modem services, but recently stopped in light of the Commission's Declaratory Ruling. See Michael Grebb, *As Service Levels*

privacy regime for all ISPs, as contemplated by various privacy bills currently pending before Congress.^{107/} Pending the enactment of legislation, the Commission can reasonably expect that cable Internet service providers, including Comcast, will continue to responsibly self-regulate to ensure their customers' privacy.^{108/}

Subjecting cable Internet services to both section 631 and to new state and local online privacy requirements would create a dual regime of uncertain and potentially conflicting regulatory obligations, leaving consumers and cable operators unable to determine their privacy rights and obligations. Conversely, a single national privacy regime would provide needed clarity for those providing cable Internet service and those using it.

At the very least, the Commission must clarify that state and local privacy obligations are preempted. It is simply not in the public interest for cable Internet

Rise, Gripes Persist, Multichannel News, May 6, 2002. Washington State also recently enacted stringent customer service standards. *Id.*

^{107/} *The Consumer Protection Privacy Act of 2002*, H.R. 4678, 107th Cong. (2002) (proposing privacy requirements to preclude the usage of personally identifiable information); *Online Privacy Act*, H.R. 89, 107th Cong. (2002) (making it unlawful to use or disclose personal information that violates regulations to be established by the Federal Trade Commission); *Online Personal Privacy Act*, S. 2201, 107th Cong. (2002) (establishing policies governing the use, collection, and disclosure of personally identifiable information collected online).

^{108/} Comcast greatly respects the privacy of its customers and will continue to do so. Customer privacy has been and remains part of Comcast's business culture. We believe we are the first cable company to have named a Chief Privacy Officer to review, apply, and maintain our privacy policies and practices.

In the absence of specific legislation, Comcast's privacy policy for its Internet customers is consistent with its protection of its cable customers' privacy interests. The home page of the comcast.net web site has a direct link to our privacy policy for our High-Speed Internet service. Privacy issues are also explicitly addressed in the subscriber agreement that applies to all of our High-Speed Internet customers, who must acknowledge the subscriber agreement before using our Internet service.

providers, ISPs, and other online providers to have to comply with inconsistent requirements from town to town.^{109/} Consumers would be better served by consistent privacy protections across the ever-increasing array of Internet services. Because cable modem service is an interstate information service, the Commission has the authority both to preempt requirements imposed by state and local entities and to forbear from imposing privacy regulations of its own. We urge the Commission to do both.

IV. CONCLUSION

For all of the foregoing reasons, Comcast urges the Commission to maintain its hands-off approach to cable Internet service. No new federal requirements should be imposed, and federal power should be used only to prevent state and local governments from burdening this competitive and unregulated service with unneeded requirements and unjustified taxes.

Respectfully Submitted,

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^{109/} For example, Seattle has passed a privacy proposal, which imposes additional requirements on cable operators, including burdensome notification requirements and vague technological obligations. See J. Martin McOmber, *\$20 Million Approved to Bury Utility Lines in Rainier Valley*, The Seattle Times, Apr. 23, 2002, available at <http://www.seattletimes.com> (reporting that the Seattle City Counsel passed the legislation that requires “companies offering television and Internet services to notify customers every time they plan to share personal information to marketers and to provide a postcard or toll-free phone number to opt out”). In addition, Minnesota recently enacted privacy requirements for ISPs and Internet content providers. See John Rendelman, *Gov. Jesse Ventura Signs Internet Privacy Bill*, Information Week, May 20, 2002, available at <http://www.informationweek.com/story/IWK20020522S0009>.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Comments of Comcast Corporation was served, by the noted methods, the 17th date of June 2002, on the following:

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